(3)

No. 06-975

IN THE

Supreme Court of the United States

JAMES A. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

JEFFREY T. GREEN*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

* Counsel of Record

April 6, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

I. In reviewing convictions for perjury and obstruction of justice, both based solely on three allegedly false statements to a grand jury, did the Fifth Circuit err in refusing to give de novo or plenary consideration to petitioner's defense of literal truth, which this Court in *Bronston* v. *United States* treated as a threshold issue for the court, and instead affirming simply on the basis of deferential, sufficiency of the evidence review?

II. In reviewing the same two convictions, did the Fifth Circuit further err in refusing, contrary to the clear law of ten other circuits, to give de novo or plenary consideration to petitioner's defense that the prosecutor's questions which elicited the charged statements were excessively and fundamentally ambiguous, and instead affirming simply on the basis of deferential, sufficiency of the evidence review?

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Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused,* 80 Cornell L. Rev. 260, 315 (1995) 11

J.F. Stephen, *A History of the Criminal Law of England* (London, 1883) 12

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit organization with a direct membership of more than 12,800 attorneys and more than 35,000 affiliate members, including private criminal defense lawyers, public defenders, active U.S. military defense counsel, judges, and law professors. NACDL was founded in 1958 and seeks to promote justice and due process for persons accused of crimes or other misconduct. To that end, NACDL regularly files *amicus curiae* briefs in cases that raise issues of concern to the fairness of the nation's criminal justice system.[1]

The related issues presented here—the scope of the "literal truth" and "fundamental ambiguity" defenses to perjury—are of great and recurring importance to the nation's criminal justice system. NACDL offers its view that witnesses must be shielded from prosecutions alleging perjury based on statements that either are literally true or arise from questions that are so ambiguous as to lack a discernible meaning. NACDL believes that the experience of its membership provides it with a unique perspective that will assist the Court in evaluating the potential for injustice under the Fifth Circuit's application of the federal perjury statute.

SUMMARY OF ARGUMENT

Federal law provides that a prosecution for perjury can only go forward where a witness testifying under oath "knowingly makes any false material declaration." 18 U.S.C. § 1623(a). The courts of appeals disagree over whether this provision

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[1] Pursuant to Rule 37.6, no counsel for any party had any role in authoring this brief, and no person other than the *amicus curiae* and its counsel made any monetary contribution to its preparation or submission. The parties have consented to the filing of this brief in letters of consent on file with the Clerk.

creates an absolute bar on perjury prosecutions for witnesses who provide misleading, and also disagree over whether a fundamentally ambiguous question can support a perjury prosecution. See Part I, *infra*. That result muddles the definition of perjury and leads to its inconsistent application, undermining the general fairness necessary to justify, "the drastic sanction of a perjury prosecution." *Bronston* v. *United States*, 409 U.S. 352, 358 (1973); see Part II, *infra*. Accordingly, this Court's review is required.

The Fifth Circuit allows for perjury convictions when an answer is literally true but misleading, if that answer was responsive to the question asked. The Fifth Circuit also allows perjury charges to be submitted to the jury where the questions are so ambiguous as to lack a discernible meaning. See Pet. App 29a & n.16. This Court should reject such broad leeway for perjury prosecutions. First, the lower court's approach shifts the focus in claims of literal truth away from the accuracy of testimony and towards the myriad inferences a jury could draw from a witness' answers. Second, that approach needlessly reduces the prosecutor's burden to ask direct and material questions. Petitioner's case raises additional concerns because the scrutinized testimony occurred during the inquisitional format of a grand jury hearing. In addition to these shortcomings in terms of fairness, the Fifth Circuit's rule fails to yield any meaningful benefit to the functioning of the criminal justice system. Given the severity of the sanctions associated with perjury, there is little reason for this Court to ratify the Fifth Circuit's expansive definition of perjury. See Part III, *infra*.

ARGUMENT

I. THE OUTCOME OF THIS CASE TURNS ON TWO CIRCUIT SPLITS THAT THIS COURT SHOULD RESOLVE.

The circuits disagree about the availability of the literal truth bar to perjury prosecutions under the federal perjury

statute. In *Bronston*, this Court unanimously held that a witness may not be convicted of perjury for providing a literally true answer under oath that is unresponsive to the question asked and arguably misleading by negative implication. Here, the Fifth Circuit adopted a crabbed reading of *Bronston* embraced by six other circuits that confines its rule to an exceptionally narrow set of circumstances. In holding that literal truth is only a legal bar to a perjury prosecution in cases of unresponsive answers, the Fifth Circuit removed the literal truth bar from a significant portion of perjury prosecutions—those in which a witness provides a responsive answer that is literally true but also potentially misleading. See *United States* v. *Brown*, 459 F.3d 509, 528 n.16 (5th Cir 2006).[2] In those cases, literal truth will only bar prosecution where the judge finds, under a sufficiency of the evidence standard, that no reasonable juror could have found the defendant's answer false. Other circuits have held that *Bronston* recognized the legal insufficiency of a perjury indictment for testimony the judge deems objectively true whether or not the answer was responsive.[3]

This conflict should not be disregarded. It creates different responsibilities for witnesses who testify in judicial proceedings based on the circuit where they appear. In circuits adopting the broader view of *Bronston*, witnesses have the clear and simple obligation of answering all questions accurately. In those circuits who take the narrow approach to *Bronston*, witnesses must also consider whether

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[2] While the specific testimony at issue is more completely described in Petitioner's brief, Mr. Brown's central claim is that his testimony before the grand jury was literally true and that the district court erred in not considering this to be a legal bar to his perjury prosecution. *See* Pet. at App. 24a-29a.

[3] *See United States* v. *Shotts*, 145 F.3d 1289, 1299 (11th Cir. 1998); *United States* v. *Earp*, 812 F.2d 917, 919 (4th Cir. 1987); *see also United States* v. *Laikin*, 583 F.2d 968, 970-71 (7th Cir. 1978); *United States* v. *Vesaas*, 586 F.2d 101, 103-04 (8th Cir. 1978).

their otherwise truthful answers carry with them any misleading implications. In holding that any rational inference that a truthful answer might have been misleading is sufficient to present a perjury prosecution to a jury, these circuits have greatly expanded the criminal liability associated with the simple act of testifying. This liability is particularly acute in cases like Mr. Brown's that emerged out of the inquisitional format of a grand jury hearing. This Court should grant certiorari to resolve this conflict among the circuits and to reaffirm the absolute bar against prosecutions for perjury when a witness testifies to the literal truth.

Equally significant is the Fifth Circuit's departure from the established practice of every other circuit with respect to the standard of review of a defense of fundamental ambiguity. It is well established virtually everywhere that a perjury conviction cannot follow from a question that is fundamentally ambiguous, as such a question is "not amenable to jury interpretation." *United States* v. *Serafini*, 167 F.3d 812, 820 (3rd Cir. 1999). Except for the Fifth Circuit, all of those circuits which have narrowed the holding of *Bronston* concerning the literal truth defense still take seriously *Bronston*'s admonition that "[p]recise questioning is imperative as a predicate for the offense of perjury." 409 U.S. at 362. The First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have all recognized that claims of fundamental ambiguity are questions of law to be decided by the trial judge in the first instance and review *de novo* on appeal. See Pet. App. at 20 n.16. The Fourth Circuit actually goes father than the other circuits in precluding perjury prosecutions from reaching the jury where there is any ambiguity in the questions asked. *United States* v. *Race*, 632 F.2d 1114, 1120 (4th Cir. 1980).

The Fifth Circuit's holding, however, requires that allegations of perjury be submitted to the jury notwithstanding assertions of fundamental ambiguity, and that convictions be reviewed only for sufficiency of the

evidence on appeal. The Fifth Circuit thus eliminates the fundamental ambiguity doctrine as bar to prosecution in the first instance and affords the highest degree of deference to jury determinations of what is a quintessentially judicial function, parsing language. In contradicting the well established and generally accepted rationale for affording de novo review to claims of fundamental ambiguity, the Fifth Circuit has created a circuit split that serves only to expand the potential scope of perjury convictions.

II. THE FIFTH CIRCUIT'S APPROACH RESULTS IN UNCLEAR AND INCONSISTENT APPLICATION OF THE FEDERAL PERJURY STATUTE.

The Fifth Circuit's rule subjects witnesses to potential criminal liability for perjury when their accurate answers carry with them arguably misleading implications. But the federal perjury statute, 18 U.S.C. § 1623, does not support convictions stemming from any and all inferences associated with testimony. The statute punishes lying, rather than true statements that mislead. *Id.* ("Whoever under oath . . . in any proceeding before . . . a grand jury . . . knowingly makes any *false* material declaration . . . shall be fined under this title or imprisoned not more than five years, or both.") (emphasis added). By interpreting the language of § 1623 to ignore this distinction, the Fifth Circuit expanded the scope of criminal liability for perjury beyond what Congress envisioned. In doing so, the Fifth Circuit added a confusing new step in the analysis for the literal truth defense to perjury. This needless layer of complexity fosters the inconsistent application of federal perjury law.

Under the Fifth Circuit's rule, a district judge faced with a perjury charge and a defense of truth must engage in a bifurcated inquiry. First, it must determine whether a witness was responsive or unresponsive in answering a question. This additional inquiry adds only confusion to federal perjury law. The line between responsiveness and unresponsiveness is unclear and not easily drawn. To an extent, the Fifth Circuit's

rule recycles the government's argument in *Bronston* that the intent of a witness to mislead the questioner is sufficient to sustain a perjury conviction. See *Bronston*, 409 U.S. at 359. A standard for perjury that focuses not upon the accuracy of the statements made, but upon the motive or intent of a witness in responding to a question would amount to a rekindling of the sort of conjecture disfavored in *Bronston* and, as this Court has already noted, "inject a new and confusing element into the adversary testimonial system we know." *Id.* The addition of such a factor simply does not lend itself to consistent application or the establishment of clear legal guidelines.

Only after finding the answer unresponsive can a judge reach the central issue in a literal truth analysis: The truth of the answer. In effect, the circuits following the approach taken by the Fifth Circuit have transformed the principal inquiry in perjury prosecutions from falsity to responsiveness. The rationale for this departure argues that unresponsive answers require jury "speculation" that does not permit a "finding beyond a reasonable doubt that [an] answer is truthful." See *United States* v. *DeZarn*, 157 F.3d 1042, 1045 (6th Cir. 1998). The argument concludes that the same sort of speculation is not required if an answer is responsive. Yet the Fifth Circuit's rule still requires significant speculation as it asks for jurors to focus on the motive or intent of a witness in using the language that he did. The distinction between responsive and unresponsive answers cannot explain the reason for barring perjury prosecutions under *Bronston*. The reason for the literal truth defense is not based on the sufficiency of evidence in cases of unresponsive answers or the jurors' potential difficulty in assessing the truth; instead, the defense is predicated upon the unfairness of imposing the "drastic sanction of a perjury prosecution to cure a testimonial mishap that could readily have been reached with a single additional question." *Bronston*, 409 U.S. at 358.

The sole consideration under the literal truth defense should remain whether the answer was factually untrue. To hold otherwise could make witnesses "unsure of the extent of their responsibility for the misunderstandings and inadequacies of examiners," and make the outcome of a perjury trial turn upon "the vague rubric of 'intent to mislead' or 'perjury by implication.'" *Id.* at 359. Such ambiguity could have the effect of discouraging the act of testifying. See Study of Perjury, *reprinted in* Report of New York Law Revision Commission, Legis. Doc. No. 60, at 249 (1935). This problem is accented in the inquisitional grand jury format where a witness does not enjoy the presence of counsel to object to the formulation of a question. See *United States* v. *Mandujano*, 425 U.S. 564, 581 (1976). The criminal justice system is best served by a system that inspires confidence among witnesses that responsibility is to present testimony that is factually accurate. Witnesses should not be forced to measure their responses based on the inferences a future jury could draw from a careful parsing of their language based on a careful review of a transcript. Such a complex form of linguistic analysis has no place where the consequence is a severe criminal sanction.

Additionally, the Fifth Circuit precludes the notion that there are questions which are fundamentally ambiguous as a matter of law. Thus, the Fifth Circuit assigns to juries the twin responsibilities of determining the ambiguity of a question and then whether the answer provided was true or untrue. The threshold question in such a case should remain in the hands of the judge. To hold otherwise is to allow for greater inconsistency in the application of the fundamental ambiguity doctrine, as the notion of ambiguity will be based on the determination of a jury doing no more than reading the same transcript the judge would consider under the majority approach. Trial judges are better positioned to make this evaluation based on their experience in parsing language, considering testimony and reading trial transcripts. To submit

both ambiguity and truth questions to a jury's broad discretion plainly will result in perjury convictions in cases that would otherwise have been dismissed as stemming from a fundamentally ambiguous question.

III. THE LOWER COURT'S PERJURY RULE IS EXPANSIVE AND OVERINCLUSIVE.

Under the Fifth Circuit's narrow reading of *Bronston*, a jury can consider a perjury case where the central issue involves a factually accurate statement., or one that is made in response to questions that render its truth or falsehood a matter of speculation.

This approach ignores the central principles in *Bronston*—that the burden to elicit information during adversarial questioning falls squarely on the shoulders of the lawyer asking questions. *Bronston*, 409 U.S. at 358-59 ("If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.").

The Fifth Circuit's narrow reading of *Bronston* turns this principle on its head. When providing a responsive answer, the burden shifts to the witness to provide more than a truthful answer. He must provide an answer free of any inference or subtlety, and one that clarifies beyond doubt any ambiguity that is inherent in the question. For this reason, an answer that is arguably misleading by implication or as a consequence of the indiscernible meaning of the question, should not be sufficient basis for a jury trial on a perjury charge.

Grand juries cast an imposing shadow over witnesses that testify before them because of their inquisitional nature. They conduct their work in secret, provide limited rights to witnesses, and possess unusually broad powers of investi-

gation.[4] The near absolute control prosecutors exercise over grand jury proceedings combined with the almost exclusive use of leading questions creates a particularly intimidating environment. This Court has repeatedly described grand juries as "a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result." *Blair* v. *United States*, 250 U.S. 273, 282 (1919); see also *United States* v. *John Doe, Inc. I*, 481 U.S. 102, 118 (1987). The Petitioner's testimony that served as the basis for his perjury conviction, therefore, came in the context of a style of interrogation that "always creates a great risk that the witness will misunderstand the questions or that the prosecutor will put words in the witness' mouth." *United States* v. *Boberg*, 565 F.2d 1059, 1063 (8th Cir. 1977).

Perjury prosecutions grounded in grand jury testimony therefore warrant careful scrutiny. The imbalance of power prosecutors enjoy in this unique procedural setting and the potential for using this setting as a means of eliciting perjury through a "perjury trap" is well established. See, *e.g.*, *United States* v. *Chen*, 933 F.2d 793, 796 (9th Cir. 1991); Bennett L. Gershman, *The "Perjury Trap,"* 129 U. Pa. L. Rev. 624 (1981). Further, a witness must appear in a grand jury proceeding without the benefit of counsel, *e.g. Mandujano*, 425 U.S. at 581, who might, for example, object to ambiguous or compound questions. Given the severe consequences associated with a perjury prosecution and the favorable balance of power already enjoyed by prosecutors in a grand jury proceeding, the burden in the questioning process must remain with the interrogator. Allowing perjury prosecutions to proceed without judicial screening as is afforded outside the Fifth Circuit transforms the grand jury

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[4] *See generally* Susan W. Brenner & Lori E. Shaw, *Federal Grand Jury: A Guide to Law and Practice* § 3:2(a) (2007) (providing a brief overview of the extensive investigatory powers of grand juries).

room into a minefield of criminal liability for suspect witnesses who come forward to testify.

The Fifth Circuit's approach also broadens the considerable control prosecutors already posses over perjury prosecutions. Perjury is among a class of offenses where there is no personal victim. The supposed victim is the truth and the justice system as a whole. Prosecutors, as the custodians of the justice system, are vested with the power to protect its integrity through the initiation of perjury prosecutions. In this setting, they assume the dual role of victim and guardian of the truth and the decision to prosecute for perjury rests entirely within their discretion. This scenario allows prosecutors to exercise unbounded discretion and to use perjury prosecutions as an alternative to prosecution on the merits of the underlying violations being investigated. By expanding the situations constituting colorable perjury prosecutions, the Fifth Circuit has provided prosecutors with expanded use of this tool. If accurate or highly ambiguous testimony may sustain a conviction for perjury, then § 1623 will take on a foreboding quality that makes the act of testifying under oath an inherent source of severe criminal jeopardy. See Gershman, *supra* at 626 (noting the possibility of prosecutors concluding that in a grand jury context that "if we can't get him for a real crime, we'll get him for perjury"). At a minimum, having this technique available in a handful of circuits creates an inconsistency that this Court should take this opportunity to address. See discussion *supra* Part I.

The power prosecutors have over grand jury proceedings accentuates the potential for abuse of this expanded discretion. While this Court has attempted to maintain the traditional role of the grand jury "as a kind of buffer or referee between the Government and the people," *United States* v. *Williams*, 504 U.S. 36, 47 (1992) (citations omitted), it has also noted an erosion of this function, See *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973) (acknowledging that "the grand jury may not always serve its historic role as a

protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor"). This stems from modern innovations in grand jury procedure. Prosecutors now decide which witnesses to call and what questions to ask, typically without even consulting the grand jury. Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 Cornell L. Rev. 260, 315 (1995). In its manual on federal grand jury practice, the Department of Justice now instructs prosecutors to preview the testimony of fact witnesses before calling them to the grand jury. U.S. Dep't of Justice, *Federal Grand Jury Practice* 204 (2000), *available at* http://www.usdoj.gov/atr/public/guidelines/4371.htm. The manual also suggests that prosecutors require grand jurors to hold their questions until after the prosecutor's questioning is completed, then allow the witness to leave the room, collect questions from jurors, and ask the question himself or herself after the witness returns. *Id.* at 217. The goal of this process is to give prosecutors "some control over the questions." Such an expansion in prosecutorial control over grand jury counsels against limitations on defenses has become a weapon for prosecutors to use in the absence of any other indictable information. Short of an extraordinary circumstance where a defendant can demonstrate bad faith or an unconstitutional motive, those decisions are immune from judicial review. See *Preliminary Proceedings*, 34 Geo. L.J. Ann. Rev. Crim. Proc. 197, 197-10 (2005).

While tipping the scales in favor of prosecutors, the Fifth Circuit's rule does so without providing any meaningful benefit to the criminal justice system. The basis for criminalizing perjury stems from the need to guarantee the integrity and accuracy of the judicial process. A narrow reading of *Bronston* merely expands the scope of situations lending themselves to perjury prosecutions without promoting this goal. Additionally, perjury prosecutions carry an underlying purpose of deterring other acts of perjury. Any deterrent effect of an expanded perjury standard will not apply to

testimony a witness regards as factually true or fundamentally ambiguous. If anything, expanding the scope of perjury statutes will merely serve to increase the number of questionable perjury prosecutions without actually decreasing the number of instances of blatant perjury.

The crime of perjury carries with it some of the most severe consequences in the American legal system and has long been recognized as one of the most serious in the criminal justice system. It involves breaking a promise to tell the truth under oath. Additionally, it represents deliberate disobedience to a request from the government necessary to run a functional criminal justice system and, perhaps most fundamentally, it involves an act of deception. Accordingly, it has long been regarded as one of the most grievous crimes in our legal tradition. 1 J.F. Stephen, *A History of the Criminal Law of England* 11 (London, 1883) ("[w]hoever gives false evidence must be thrown from the Tarpeian rock."); 1 W. Hawkins, *A Treatise of the Pleas of the Crown* 172 (London, 1724) (calling perjury "of all Crimes whatsoever the most Infamous and Detestable."). The condemnation associated with a perjury conviction remains enshrined in modern law. A conviction for perjury is one of a narrow category of crimes of dishonesty under the Federal Rules of Evidence that can serve as the source of an impeachment in any future trials without the normal ten year limitation. See Fed. R. Evid. 608(b).

Liberalizing the standards for perjury prosecutions serves only to overcriminalize the act of testifying and to thereby dissuade those who might otherwise seek to provide critical information to a grand jury, petit jury, or other tribunal. The sweeping condemnation associated with a perjury conviction must not be allowed to turn on a jury's perception of the misleading implications of a witness' literally true statements said under oath. As this Court has noted, the federal perjury statute shall not be "loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the

questioner—so long as the witness speaks the literal truth." *Bronston*, 409 U.S. at 360. Rather, the criminal justice system is best served by a clear and consistent limit on perjury prosecutions that requires testimony that is indisputably untrue. Accordingly, the Fifth Circuit's narrow reading of *Bronston* warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

JEFFREY T. GREEN*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

* Counsel of Record

April 6, 2007